80-2180

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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MCROBERTS PROTECTIVE AGENCY and
STATE INSURANCE FUND,

Petitioners,

v.

SAMUEL ARBEENY and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,

Respondents,

and

MCROBERTS PROTECTIVE AGENCY and
STATE INSURANCE FUND,

Petitioners,

v.

MICHAEL CONLON and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH F. MANES
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New York 10520
Attorney for Petitioners

Question Presented

Whether Arbeeny and Conlon, pier guards employed by McRoberts Protective Agency, a private security agency, whose principal duty was to insure against cargo pilferage, were engaged in maritime employment.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To: THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Petitioners, McRoberts Protective Agency and the State Insurance Fund, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on March 9, 1981.

Opinions Below

The March 9, 1981 opinion of the Court of Appeals for the Second Circuit, whose judgment is herein sought to be reviewed, is not yet reported but is reprinted as Appendix A hereto, *infra,* page 1a.

The decision and dissenting opinion of the Benefits Review Board in *Arbeeny* v. *McRoberts Protective Agency and State Insurance Fund* are reported at 12 BRBS 435 and are reprinted as Appendix B hereto, *infra,* page 7a.

The decision and dissenting opinion of the Benefits Review Board in *Conlon* v. *McRoberts Protective Agency and State Insurance Fund* are reported at 12 BRBS 473 and are reprinted as Appendix B hereto, *infra,* page 15a.

The decision and order of the Administrative Law Judge in *Arbeeny* v. *McRoberts Protective Agency and State Insurance Fund,* filed on May 25, 1979, is reprinted as Appendix D hereto, *infra,* page 20a.

The decision and order of the Administrative Law Judge in *Conlon* v. *McRoberts Protective Agency and tSate Insurance Fund,* filed on May 30, 1979, is reprinted as Appendix E hereto, *infra,* page 25a.

The decision and order of the Second Circuit Court of Appeals on Petitioners' Motion to Dismiss the Petition of the Director, Office of Workers' Compensation Programs, is not a published opinion but is reprinted as Appendix F hereto, *infra,* page 29a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit (Appendix, *infra*, page 1a), was entered on March 9, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

Statute Involved

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq. 33 U.S.C. 902, as amended, provides in pertinent part as follows:

> "902 definitions . . . when used in this Act . . .
>
> (3) The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations and any harbor worker including a ship repairman, shipbuilder and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.
>
> (4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel)."

33 U.S.C. 9903, as amended, provides in pertinent part as follows:

> "903 Coverage.
>
> (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only

if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel)."

Statement of the Case

These are claims for compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act 33 U.S.C. 901 et seq., by two employees of McRoberts Protective Agency.

Both Arbeeny and Conlon were employed as security guards, whose primary duties were to safeguard cargo on a pier; to prevent unauthorized persons from leaving or boarding a vessel; to check the ingress and egress of motor vehicles to the pier area, and to patrol the farm area and pier.

A. Procedural History—Arbeeny

After Formal Hearing held pursuant to Subpart C of 20 CFR 702.331 et seq., Administrative Law Judge Robert G. Mahoney determined that the jurisdictional status requirement for coverage under the Act was not met. This was predicated on his conclusion that cargo security was not an integral part of cargo handling. That decision was the subject of an appeal by the claimant Arbeeny and the Director, OWCP, to the Benefits Review Board pursuant to the provisions of Subpart B of 20 CFR 802.201.

The Benefits Review Board, one member dissenting, affirmed the decision of Administrative Law Judge Mahoney and reiterated the finding therein that claimant's duties as a pier guard, were not an integral part of longshoring operations. The Board noted that the claimant's over-all duties lacked a realistically significant re-

lationship to maritime duties involving navigation and commerce.

Both claimant and the Director, OWCP, filed Petitions for Review in the Court of Appeals for the Second Circuit.[1]

B. Procedural History—Conlon

After Formal Hearing being held pursuant to Subpart C of 20 CFR 702.331 *et seq.*, Administrative Law Judge V. M. McElroy determined that Conlon's work activities satisfied the status requirement of the Act. This, by reason of the fact that he sometimes worked aboard a vessel and within the boundaries of the pier. That decision was the subject of an appeal by McRoberts Protective Agency and the State Insurance Fund to the Benefits Review Board pursuant to the provisions of Subpart B of 20 CFR 802.201. The Benefits Review Board, with one member dissenting, reversed the decision of Administrative Law Judge McElroy, and for the reasons expressed in its decision in *Arbeeny,* dismissed the claim.

Thereafter, Conlon filed a Petition for Review with the Court of Appeals for the Second Circuit naming the Director, OWCP, and McRoberts Protictive Agency and State Insurance Fund as respondents.

The Court of Appeals for the Second Circuit ordered that the Petitions for Review be consolidated, and after argument, granted both Petitions for Review and set aside the Orders of the Board on the grounds that both claimants were engaged in maritime employment.

The Court noted at Page 1740 of its opinion:

> "Their primary duty as pier guards was to insure the protection of cargo on the pier, dock and adjacent

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[1] Upon a motion by the respondent, the Petition for Review of the Director, OWCP was dismissed for lack of statutory standing by reason of the fact that the Director was not a party aggrieved under 33 U.S.C. 921(c).

> areas of marine terminals against theft, pilferage, vandalism and fire. While most of their surveillance actively was performed on the pier, at times petitioners were obliged to board vessels and position themselves on gangways, decks and ship hatches or holds."

As a matter of fact, Arbeeny's log book, which contained 401 entries, demonstrated that he was stationed at a hatch on only two occasions. But again his overall activity was directed to cargo security.

Conlon affirmed the fact that most of his time was spent on the pier. He was at a hatch only once.

On these records, the Court of Appeals for the Second Circuit rejected the determination of the administrative agency below, to wit: the Benefits Review Board, that there was no maritime employment. In fact it substituted its own judgment that the performance of the security function was integral to the loading and unloading of cargo; and hence that the activities of the pier guards, Conlon and Arbeeny, did constitute maritime employment.

In Footnote 4 to its opinion, the Court rejected the prior reasoning set forth in its previous opinion in

> *Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F. 2d at Page 52,

wherein it referred to "guards" as an unlongshoreman-like "position". The Court went on to note that the Panel which had decided Dellaventura was not confronted with the kind of factual situation presented by the case at bar. It further noted that a proper determination as to a pier guard's status under the Act would have to be made on a case-by-case basis. This is the ruling sought to be reviewed on this Petition.

REASONS FOR GRANTING THE WRIT

It is clear from the opinion of the Court of Appeals, particularly Footnote 4 (Appendix A, *infra* page 1a) that the decision of that Court is not in accord with the intent of Congress, as interpreted by this Court, and thus constitutes an error of law. As this Court has pointed out in

> *P. F. Pfeiffer Co., Inc.* v. *Ford,* 444 U.S. 69, 100 S. Ct. 328 (1979);
>
> *Northeast Marine Terminal Co., Inc.* v. *Caputo,* 432 U.S. 249 (1977);
>
> *Fusco* v. *Perini North River Associates,* 601 F. 2d 659 (2d Cir 1979), vacated and remanded, 444 U.S. 1028 (1980),

the test for determining maritime employment and hence the requisite status under the Act must be an occupational test.

The apparent predicate of the Court of Appeals' decision, i.e. the possibility that these claimants could be directed to go on board ship in the performance of their duties, is evidence that the Court of Appeals has reverted to the disaproved geographical test which was eliminated by the 1972 amendments as pointed out in this Court's remand of

> *Fusco* v. *Perini North River Associates,* 601 F. 2d 659 (2d Cir 1979), vacated and remanded, 444 U.S. 1028 (1980).

It seems clear that, had the Court of Appeals employed the preferred occupational test, its previous pronouncement in

> *Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F. 2d 35 at 52 (2d Cir 1976),

to the effect that:

> "Obviously it is not enough that the claimant calls himself a longshoreman, or that a longshoreman's union in a particular port has forced employers to hire its members for such *unlongshoremanlike* positions as clerk or *guards*" (emphasis added),

would have been controlling. However, the Court of Appeals has now apparently rejected the reasoning therein and, with repeated references to the guards' placement on board ship, the Court has ruled that the security function, performed by these guards, is an integral part of the loading and unloading of cargo and thus constitutes maritime employment.

If the Court had applied an occupational test, Footnote 4 would be meaningless. Rather, the Court has failed to make a general determination of status on an occupational basis and has opened the proverbial floodgates with its recital in Footnote 4 that coverage under the Act for particular pier guards must be decided on a case-by-case basis. Clearly the Court of Appeals has not been guided by the mandate of *Pfeiffer* (*supra*) and *Caputo* (*supra*).

Furthermore, if this ruling is allowed to stand, it will serve to restore the kind of variable and fortuitous coverage under the Act which it was Congress' stated intention to eliminate by means of the 1972 amendments to the Act.[2]

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[2] "[I]n the section describing the shoreward extension, the Committee Reports state:

> 'The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, shipbuilders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury

(footnote continued on following page)

(footnote continued from preceding page)

occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.' S. Rep. 13; H.R. Rep. 10 [Emphasis added].

'The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloading from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform, is typically unloaded from the ship and immediately sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e., a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters." S. Rep. 13; H.R. Iep. 10-11 [Emphasis added].

'Section 2(a) amends section 2(3) of the Act to define an "employee" as any person engaged in maritime employment. The definition specifically includes any longshoreman or other person engaged in longshoreing [sic] operations, and any harborworker, including a ship repairman, shipbuilder and shipbreaker. It does not exclude other employees traditionally covered but retains that part of 2(3) which excludes from the definition of "employee" masters, crew members or persons engaged by the master to unload, load or repair vessels of less than eighteen tons net.' S. Rep. 16, See also, H.R. Rep. 14. [Emphasis added]."

These cases present a question of first impression, to wit: is a pier guard, employed by a security agency to keep watch over cargo as it is unloaded from ships by longshoremen, engaged in maritime employment? In order to prevent multitudinous and protracted litigation, a single answer to this question based on an occupational evaluation must be provided. This is in accord with this Court's pronouncement in *Pfeiffer* (*supra*) to the effect that:

> "A definition of maritime employment that reaches any worker who moves cargo between ship and land transportation will enable both workers and employers to predict with reasonable assurance who on the situs is protected by the 1972 Act."

This kind of single determination would eliminate the varying results of the case-by-case evaluation such as that suggested by the Court of Appeals. Moreover, it would eliminate uncertainty as to coverage in those charged with the administration of the Act, as well as workers, employers and insurers.

If the decision of the Court of Appeals is allowed to stand, not only will coverage under the Act be variable and uncertain, but the proper means of determining maritime employment will be unclear as well.

This decision restores the bifurcated coverage deprecated by the Supreme Court in *Caputo* (*supra*).

It represents a return to a variable status for these employees.

As the Court below notes, "It may well be that some pier guards stationed at waterfront sites are not so involved", vis-a-vis the loading and unloading function. There is thus created a clear division as to eligibility for coverage within a homogenous class of employees.

The court's recitation, at page 1740 of its decision, of its view of the duties of pier guards, demonstrates beyond

doubt, that it equated Arbeeny's duties with that of a "checker".

Since "checkers" are specifically included within the Act's coverage, Arbeeny must therefore be deemed to be engaged in maritime employment.

The record does not support such a conclusion. It is true enough that Arbeeny, as part of his security duties, observed the checking of cargo, but this observation, for security purposes, cannot be equated with the duties of a checker.

Given the circumstances, Arbeeny's activities can best be summed up by reference to the phrase "quis custodiet custodians".

Petitioners must reiterate the fact that Arbeeny's log book containing some 401 entries of work activities demonstrated that he was stationed at a hatch on only two occasions.

Arbeeny was not concerned with the delineation of all cargo but only that small portion denominated as "valuable"; and then only to prevent its being purloined.

There is no evidence that he ever took this cargo into his possession. He merely insured that it was present when either loaded or off-loaded from a vessel.

One must immediately pose the question that if Arbeeny accomplished the same security purposes by having the valuable cargo brought to him for identification at his station, on the pier, or at the guard shack, could he still be said to be engaged in maritime employment? It is obvious that he performed only a security function and that his work activities did not have any realistic relationship to maritime employment.

In the decision of the Court below, Footnote 4 seems to indicate that Arbeeny would not be engaged in maritime employment if such situation above outlined prevailed.

It is immediately apparent, therefore, that the predicate for the decision below, in *Arbeeny,* was geographical rather than occupational.

This is the precise geographical analysis rejected by the Supreme Court in *Pfeiffer* (*supra*).

The Second Circuit Court of Appeals, in *Conlon,* seems unable to cast off the geographical mesmerizaiton.

Its decision emphasizes, unduly, the fact that Conlon allegedly "boarded docked ships almost nightly to deliver or obtain manifests or invoices which, in the latter case, he then brought to stevedores or other dockside personnel for checking shortages in the shipments."

Petitioners are immediately struck by the fact that the Court below, in this instance, acknowledges the fact that Conlon, unlike its characterization in Arbeeny, did not perform duties akin to those of a "checker". How then can he be said to have been engaged in maritime employment except for the fact that the geographical miasma still lingers.

The fact that Conlon boarded a vessel to accomplish his delivery duties mandated, in its view, a conclusion of maritime employment by the Court below. This is plainly erroneous.

Again, the geographical concept is the only basis for the Court's conclusion.

Both of the instant matters are not qualitatively nor quantitatively distinguishable from

> *Maher Terminals Inc.* v. *Farrell,* 548 F. 2d 476 (3 Cir 1977).

Indeed *Farrell* (supra) may reasonably be acknowledged to be a forerunner of the *Pfeiffer* matter (supra).

This conclusion is reached by considering the disallowance in *Farrell* in that it was predicated on an evaluation of the employee's overall duties and they were not deemed to be within the maritime employment sphere.

If Section 2(3) restricts the scope of coverage to those engaged in maritime employment, then the use of such term can only refer to the nature of the worker's activities.

The language of this Court in *Pfeiffer* (supra), "Our decision serves the intent of Congress in creating the status requirement. First, it focuses upon the nature, not the location of employment. Second, it does not extend coverage to all workers in the situs area.", seems, to petitioners, to be particularly applicable to the instant cases.

A focus on the nature of the employment reveals that it is purely a security function which is being performed.

Certainly neither Arbeeny nor Conlon engaged in any intermediate steps of moving cargo between ship and land transportation or vice versa.

Further than that, if as *Pfeiffer* (supra) mandates, i.e. that Congress intended to apply a simple, uniform standard of coverage, then the instant determination of the Second Circuit Court of Appeals prevents the realization of that goal.

This, by reason of the fact that an individual security guard's coverage would depend upon the assignment policies of his employer.

If he were assigned to board a ship even for certain limited purposes, then he would be deemed to have come within the maritime employment sphere and be afforded protection under the Act.

If that be the sine qua non for coverage, then we have, obviously, only a reversion to the disapproved geographical concept by which maritime employment may be determined.

The decision represents a return to the evils sought to be cured by the 1972 amendments that workers on a covered situs walk in and out of coverage.

A decision such as this prevents both employees and employers to predict with any certainty who on a situs is protected by the 1972 Act.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A, Opinion.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Nos. 568, 569—September Term, 1980
(Argued January 16, 1981 Decided March 9, 1981)
Docket Nos. 80-4159 and 80-4158

SAMUEL ARBEENY,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Petitioners,

against

McROBERTS PROTECTIVE AGENCY AND STATE INSURANCE FUND,

Respondents.

SAMUEL ARBEENY,

Petitioner,

against

McROBERTS PROTECTIVE AGENCY AND STATE INSURANCE FUND AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Respondents.

MICHAEL CONLON,

Petitioner,

against

McROBERTS PROTECTIVE AGENCY AND STATE INSURANCE FUND AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Respondents.

Appendix A

Before:

MANSFIELD and MULLIGAN, *Circuit Judges,*
and POLLACK,* *District Judge.*

Petitions for review of orders of Benefits Review Board which held that petitioners were not "engaged in maritime employment" as defined in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §902(3), and thus not entitled to compensation for injuries suffered while working as pier guards on the Brooklyn Waterfront. Petitions for review granted and orders of Benefits Review Board set aside.

ANGELO C. GUCCIARDO, New York, N.Y. (Israel, Adler, Ronca & Gucciardo, New York, N.Y., of counsel) *for Petitioner Conlon.*

IRVING BUSHLOW, Brooklyn, N.Y. *for Petitioner Arbeeny.*

CATHERINE A. CIACONA, Washington, D.C. (U.S. Department of Labor, Washington, D.C., Carin Ann Clauss, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor, of counsel) *for Office of Workers' Compensation Programs.*

JOSEPH F. MANES, Croton-on-Hudson, N.Y. *for Respondents McRoberts and State Insurance Fund.*

MULLIGAN, *Circuit Judge:*

These petitions for review of an order of the Benefits Review Board, United States Department of Labor

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* United States District Judge for the Southern District of New York, sitting by designation.

(Board) pose the question whether the petitioners Samuel Arbeeny and Michael Conlon were engaged in "maritime employment" within Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act (Act), 33 U.S.C. §§ 901-950, and are thus entitled to compensation for injuries suffered while working as pier guards on the Brooklyn Waterfront. A majority of the Board held that neither came within Section 2(3) because their duties "lacked the realistically significant relationship to maritime activities involving navigation and commerce over navigable waters."[1] We grant the individual claimants' petitions for review and set aside the orders of the Board.

Both petitioners were injured on waterfront piers in the course of their employment as pier guards. There is no question therefore that the "situs" requirement of 33 U.S.C. § 903(a) has been satisfied.[2] The issue is whether

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[1] The Board affirmed the decision of the administrative law judge that petitioner Arbeeny was excluded from coverage. Decision and Order, Nos. 79-371 and 79-371A (June 23, 1980). It reversed another administrative law judge's order determining petitioner Conlon to be engaged in "maritime employment." Decision and Order, No. 79-399 (June 30, 1980). Our jurisdiction over these petitions is conferred by 33 U.S.C. § 921(c).

[2] As broadened by the 1972 amendments to the Act, the so-called "situs" requirement covers any injury

> "occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

Act § 3(a); 33 U.S.C. § 903(a). To be eligible for benefits a person must have been injured within this covered area and qualify as a maritime employee as defined by § 2(3) of the Act, 33 U.S.C. § 902(3). See *infra*.

they were within the "status" requirement of the Act which by the 1972 amendments thereto extends coverage to "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder and shipbreaker . . . ." Act § 2(3), 33 U.S.C. § 902(3).

At the time of their injuries both petitioners were employed by the respondent McRoberts Protective Agency. Their primary duty as pier guards was to insure the protection of cargo on the pier, dock and adjacent areas of marine terminals against theft, pilferage, vandalism and fire. While most of their surveillance activity was performed on the pier, at times petitioners were obliged to board vessels and position themselves on gangways, decks or in ships' hatches or holds. When valuable cargo was involved they were required to go below the deck to ensure the safety of the cargo. On occasion Arbeeny counted the cargo with a "checker" whose responsibility was to check and record the cargo removed from the hatch. Conlon in the year before his injury boarded docked ships almost nightly to deliver or obtain manifests or invoices which in the latter case he then brought to stevedores or other dockside personnel responsible for checking shortages in the shipments. Conlon was also responsible for the inspection of mooring lines to determine whether the ship was securely moored to the dock.

It has been suggested that in order "to avoid the judicial morass involved in determining whether each worker in any of 'the almost infinite range of conditions of waterfront employment' is or is not involved in the process of unloading vessels," the Act should be construed to cover all waterfront employment. *Warren Bros.* v. *Nelson*, 635 F.2d 552, 556 (6th Cir. 1980) (quoting G.

Gilmore & C. Black, The Law of Admiralty 430 (2d ed. 1975)). This court has rejected this interpretation, which would in effect read the "status" requirement out of the Act. *Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F.2d 35, 56 (2d Cir. 1976), *aff'd sub nom. Northeast Marine Terminal Co., Inc.* v. *Caputo*, 432 U.S. 249 (1977). Nonetheless the language of the 1972 Act "is broad and suggests that we should take an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial legislation." *Northeast Marine Terminal Co.* v. *Caputo, supra*, 432 U.S. at 268.[3] It is also clear that the specific occupations mentioned in Section 2(3) do not exhaust its scope. *P.C. Pfeiffer Co., Inc.* v. *Ford*, 444 U.S. 69 (1979). Longshoremen, ship repairmen, shipbuilders and shipbreakers comprise only "a part of the larger group of activities that make up 'maritime employment.'" *Id.* at 77 n. 7; see *Trotti & Thompson* v. *Crawford*, 631 F.2d 1214, 1220 (5th Cir. 1980).

The fact that the petitioners here were not job designated as longshoremen is certainly not dispositive of the issue. Neither is the fact that they did not physically load or off load cargo essential. The checker found covered by Section 2(3) in *Northeast Marine Terminal Co., Inc.* v.

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[3] Recent decisions in other circuits, notably the Fifth Circuit, emphasize the liberal scope of coverage to be extended under this view of § 2(3). See *Warren Bros v. Nelson*, 635 F.2d 552, 556 (6th Cir. 1980); *Boudloche v. Howard Trucking Co., Inc.*, 632 F.2d 1346, 1347 (5th Cir. 1980); *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 1220-21 & n. 15 (5th Cir. 1980) (act of building pier furthers process of loading and unloading vessels and thus bears a significant relationship to "longshoring operations"); *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 178 (5th Cir.), cert. denied, 434 U.S. 903 (1977) (shipbuilding company employee's act of assembling crane to be used in shipbuilding process furthers maritime function of "shipbuilding" and thus constitutes maritime employment).

Caputo, supra, was assigned the task of checking and making items of cargo as they were unloaded from a container. The Court found that "[t]his task is clearly an integral part of the unloading process . . . ." 432 U.S. at 271. Similarly here the activities of the petitioners were an integral part of the loading and unloading of cargo. Pilferage of cargo is endemic at piers. The loading and unloading process presents innumerable opportunities for theft. The major function of these petitioners was to protect against the loss of cargo which in our view unquestionably serves a maritime purpose—the safe transit of goods shipped by sea. The pervasive surveillance conducted by guards on the pier and occasionally on board ship is essential to the longshoring operation and is indeed required by the International Longshoremen's Association during the loading and the unloading process.[4]

Because we find both claimants to be engaged in maritime employment, we grant their petitions for review and set aside the orders of the Board.

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[4] The Board recognized that theft along the waterfront is a major problem plaguing the longshoring industry. We are not unmindful that this court *en passant* in *Pittston Stevedoring Corp. v. Dellaventura, supra,* referred to "guards" as an "unlongshoreman-like" position. 544 F.2d at 52. However, that panel was not faced with this factual situation involving petitioners whose duties were an inextricable part of the loading and unloading function. It may well be that some pier guards stationed at waterfront sites are not so involved. Since the Congress has not definitively addressed these situations in the statute, each case must be decided on its own merits.

Appendix B, Decision and Dissenting Opinion.

BENEFITS REVIEW BOARD
U. S. DEPARTMENT OF LABOR

No. 79-371 & 79-371A

FILED AS PART OF THE RECORD
JUN 23 1980

AGNES KURTZ/WH
(Clerk)

Benefits Review Board

SAMUEL ABBEENY

Claimant-Petitioner

v.

McROBERTS PROTECTIVE AGENCY, INC.

and

STATE INSURANCE FUND

Employer/Carrier-
Respondents

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

Petitioner

DECISION and ORDER

Appeal from the Decision and Order of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

Appendix B

Irving R. Bushlow, Brooklyn, New York, for the claimant.

Joseph F. Manes, Croton-on-Hudson, New York, for the employer/carrier.

Catherine Giacona (Carin Ann Clauss, Solicitor of Labor; Laurie M. Streeter, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

SMITH, Chief Administrative Appeals Judge:

These are appeals by the claimant and the Director, Office of Workers' Compensation Programs, from a Decision and Order (78-LHCA-592) of Administrative Law Judge Robert G. Mahony pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereinafter referred to as the Act).

Claimant was employed by McRoberts Protective Agency, Inc., (hereinafter referred to as employer) as a security guard whose principal duty was to insure against cargo pilferage. This duty involved patrolling open and covered pier areas and a nearby "farm" area to maintain cargo security. On infrequent occasions, he was required to stand on the ship or its gangway to check the crew's papers and insure that no cargo was stolen. Claimant was also required to mark all damaged cargo and broken boxes and place them to one side when working on board ship. Claimant is licensed as a security guard by the New

York Waterfront Commission. He was injured when he was struck by a hi-lo machine on a covered pier.

Claimant sought benefits under the Act. Following a hearing, the administrative law judge held that claimant was not an employee within the meaning of Section 2(3) of the Act. 33 U.S.C. § 902(3). The administrative law judge reasoned that although cargo security is an important function, it is not an integral part of longshoring operations. He concluded that claimant's employment as a security guard lacked the realistically significant relationship to maritime activities involving navigation and commerce over navigable waters required by the test enunciate dby the Board in *Sedmak* v. *Perini North River Associates,* 9 BRBS 378, BRB Nos. 77-896 *et al.* (1978), *rev'd sub nom. Fusco* v *Perini North River Associates,* 601 F.2d 659, 10 BRBS 624 (2d Cir. 1979), *vacated and remanded,* U.S., 100 S. Ct. 697 (1980), *vacated,* No. 79-4006 (2d Cir. April 11, 1980). Claimant and the Director, Office of Workers' Compensation Programs, appeal, arguing that claimant is covered by the Act.

In order to be covered, claimant must meet a two-fold test. He must show that he was injured on a covered situs under Section 3(a) of the Act. 33 U.S.C. § 903(a). In addition, his employment must meet the status definition established under Section 2(3), which provides: "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker, ..." 33 U.S.C. § 902(3).

Claimant in the instant case was clearly not a ship repairman, shipbuilder, or ship-breaker. His duties also did not meet the Board's definition of the term "harbor worker." *Stewart* v. *Brown & Root, Inc.,* 7 BRBS 356, 365, BRB No. 76-451 (1978), *aff'd sub nom. Brown &*

Root, Inc. v. *Stewart*, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979).

Moreover, we do not believe that claimant's security guard activities were an integral part of longshoring operations, nor can they be deemed maritime employment within the meaning of the Act. Arguing that claimant meets the status requirement as a "person engaged in maritime employment," claimant and the Director contend that claimant's duties in cargo security form an integral part of the loading and unloading process due to the importance of protecting against cargo theft. We reject this argument.[1] While we recognize that theft along the waterfront is a major problem of the longshoring industry, we do not believe that alone is a sufficient reason for extending the Act's coverage to security guards.

Claimant's duties as a security guard are distinguishable from those of employees who do not actually handle cargo but whose work has been found to be an "integral part" of or "necessary ingredient" in longshoring operations. Typical of such employees are those who repair and maintain longshore equipment, such as containers. *See Cabezas* v. *Oceanic Container Service, Inc.*, 11 BRBS 279, BRB No. 78-592 *et al.* (1979); *Lewis* v. *Pittston Stevedoring Corp.*, 7 BRBS 691, BRB No. 77-352 (1978). Claimant also lacks the "direct involvement" with longshore activities which has been held to confer coverage on employees involved in the process of moving cargo from ship to land transportation. *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F.2d 533, 4 BRBS 482 (5th Cir. 1976),

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[1] Although claimant occasionally marked and moved damaged cargo to one side on the pier, these activities cannot confer coverage upon claimant as he did not spend a substantial portion of his time performing such duties. *See Boudloche v. Howard Trucking Co.*, 11 BRBS 687, BRB No. 78-383 (1979).

aff'd sub nom. P.C. Pfeiffer Co., Inc. v. *Ford,* 444 U.S. 69, 100 S.Ct. 328, 11 BRBS 320 (1979).

The Second Circuit has specifically referred to security guards as an example of "unlongshoremenlike positions," even though such guards are called longshoremen or are members of the longshoremen's union. *Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F.2d 35, 4 BRBS 156 (2d Cir. 1976).

Claimant also does not meet the test for maritime employment set forth in *Sedmak* v. *Perini North River Associates,* 9 BRBS 378, BRB No. 77-896 *et al.* (1978).[2] In *Holcomb* v. *Robert J. Kirk & Associates,* 11 BRBS 835, BRB No. 78-566 (1980), the Board held that a night watchman who guarded a ship, frequently boarding it in the course of his guard duties, was not involved in maritime employment. In *Holcomb,* we concluded that security guard employment, such as claimant's, lacked the realistically significant relationship to maritime activities in-

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[2] In *Sedmak, supra,* we concluded that "a claimant's employment must have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters in order for that employment to be deemed maritime employment under Section 2(3)." 9 BRBS at 386.

The Board's decision in *Sedmak* was reversed by the Second Circuit in *Fusco* v. *Perini North River Associates,* 601 F.2d 659, 10 BRBS 624 (2d Cir. 1979), holding that the phrase "person engaged in maritime employment" includes "any person whose principal duties are performed on navigable waters as that term was defined before 1972."

However, the Board has declined to follow *Fusco* and continues to apply the *Sedmak* definition of maritime employment quoted above. *Pruner* v. *Ferma Corp.,* 11 BRBS 201, BRB No. 78-523 (1979). Furthermore, *Fusco, supra,* has recently been vacated and remanded by the Supreme Court for reconsideration in light of the Court's decision in *P.C. Pfeiffer Co., Inc. v. Ford,* 444 U.S. 69, 100 S.Ct. 328, 11 BRBS 320 (1979). U.S., 100 S.Ct. 697 (1980).

volving navigation and commerce required by *Sedmak, supra.*[3]

Claimant and the Director also argue that claimant should be covered by the Act because his duties on the ship and on the docks exposed him to the same dangers to which longshoremen are exposed. Claimant is not entitled to the Act's protection merely because he occasionally performed duties aboard ship. In *Maher Terminals, Inc.* v. *Farrell,* 548 F.2d 476 (3d Cir. 1977), a clerical worker who occasionally boarded ships to deliver packages was found outside the coverage of the Act. In addition, the Board has held that the fact that a claimant is subject to assignment aboard ship is not dispositive of coverage. *Cappelluti* v. *Sea-Land Service, Inc.,* 10 BRBS 1024, BRB Nos. 78-580/A (1979). Furthermore, in *Northeast Marine Terminal Co., Inc.* v. *Caputo,* 432 U.S. 249 (1977), the Supreme Court stated that "it is clear that persons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered." 432 U.S. at 267. The Court relied on the legislative history of the 1972 amendments which clearly indi-

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[3] Claimant and Director cite numerous pre-amendment cases, which hold that watchmen injured on board ship are covered. They argue that these decisions establish that such watchmen are "maritime employees." For the reasons stated in our decision in *Sedmak, supra,* we believe these decisions are not controlling but serve only as a "useful framework." Furthermore, we have concluded that pre-amendment cases must contain a functional analysis of an employee's duties and their relation to maritime activities in order to be useful. *See Holcomb, supra.* We have carefully examined the cases cited by claimant and conclude that they lack the necessary analysis. Rather, they turn only on the situs of claimant's injury being on pre-amendment navigable waters.

Moreover, under these decisions, claimant would not have been covered by the pre-amendment Act, since he was not injured over navigable waters, as interpreted by the pre-amendment Act.

cates Congress' intent that coverage not extend to employees who are not involved in loading or unloading a vessel merely because they are injured in an area adjoining navigable waters. S. Rep. No. 1125, 92d Cong., 2d. Sess. 13 (1972), H. Rep. No. 1441, 92d Cong., 2d Sess. 11 (1972).

We therefore conclude that claimant was not an employee under Section 2(3) of the Act. Accordingly, the Decision and Order below, denying the claim for lack of jurisdiction, is affirmed.

So Ordered.

Samuel J. Smith
Samuel J. Smith, Chief
Administrative Appeals Judge

I Concur:

Ismene M. Kalaris
Ismene M. Kalaris
Administrative Appeals Judge

Miller, Administrative Appeals Judge, dissenting:

I respectfully dissent from the affirmance of a denial of coverage for the claimant.

The basis for the denial is that claimant's employment as a security guard did not constitute an integral part of longshoring operations. Although I agree with the Director's and claimant's position that the duties of claimant fall within the broad category of longshoring operations, I find it unnecessary to make a determination on that basis.

The claimant, as part of his function as a security guard, was at times required to go aboard ships being loaded or unloaded. Since it is my view that claimant would clearly be covered, (*see* my dissents in *Sedmak, supra* and *Hol-*

comb, supra), if injured aboard a vessel, then he must also be covered when performing his duties on a covered situs. As the Supreme Court pointed out in *Northeast Marine Terminal Co.* v. *Caputo, supra,* Congress wanted a system that did not depend on the fortuitous circumstances of whether the injury occurred on land or over water.

In *Caputo,* the Court went on to say that "both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to those amphibious workers who, without the 1972 Amendments, would be covered only for part of their activity." 432 U.S. at 273. Prior to the amendments claimant would have been covered if injured aboard a vessel in the course of his employment, and to exclude him would "revitalize the shifting and fortuitous coverage that Congress intended to eliminate." 432 U.S. at 274.

I therefore, would find claimant a covered employee.

JULIUS MILLER
JULIUS MILLER
Administrative Appeals Judge

Dated this 23rd day
of June 1980.

Appendix C, Decision and Dissenting Opinion.

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR

No. 79-399

Filed as part
of the record
Jun 30 1980

(date)
Agnes Kurtz/WH
(Clerk)
Benefits Review Board

DECISION AND ORDER

MICHAEL J. CONLON,

Claimant-Respondent,

v.

McROBERTS PROTECTIVE AGENCY, INC.,

and

STATE INSURANCE FUND,

Employer/Carrier-Petitioners,

DIRECTTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Party-in-Interest.

Appeal from the Decision and Order of V. M. McElroy, Administrative Law Judge, United States Department of Labor.

Appendix C

Angelo C. Gucciardo (Israel, Adler, Ronca, and Gucciardo), New York, New York, for the claimant.

Joseph F. Manes, Croton-on-Hudson, New York, New York, for the employer/carrier.

Laurie M. Streeter, Associate Solicitor (Carin Ann Clauss, Solicitor of Labor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

SMITH, Chief Administrative Appeals Judge:

This is an appeal by McRoberts Protective Agency, Inc. and State Insurance Fund (hereinafter referred to as employer) from a Decision and Order (79-LHCA-77) of Administrative Law Judge V. M. McElroy pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act as amended, 33 U.S.C. § 901 *et seq.* (hereinafter referred to as the Act).

Claimant was employed for eighteen years by employer as a security guard, whose principal duties involved insuring the security of cargo on piers and lighters. His job required him to maintain surveillance over cargo on the pier, occasionally boarding the ships in order to watch the cargo as it was unloaded. He also boarded the ships to deliver emergency or other messages to the crew and sometimes to carry the cargo manifest on and off the ship. He also checked the ships' mooring lines in the course of his duties on the pier. Claimant never carried any cargo. He was injured on February 20, 1978, when he slipped and

fell on ice while making his rounds. Claimant had a pre-existing back injury for which he had surgery in 1974.

Claimant sought benefits under the Act. Following a hearing, the administrative law judge held that claimant's overall duties formed an integral part of the loading and unloading process. Accordingly, the judge concluded that claimant was an employee under Section 2(3) of the Act. 33 U.S.C. § 902(3). The administrative law judge awarded claimant temporary total disability benefits from February 21 to December 1, 1978, and permanent total disability benefits thereafter with the Special Fund to be liable under Section 8(f), 33 U.S.C. § 908(f), after 104 weeks. He also determined that the employer was liable for an additional assessment of compensation under Section 14(e), 33 U.S.C. § 914(e), and awarded claimant's attorney a fee for services performed.

Employer appeals the administrative law judge's finding that claimant was an employee under the Act. The Board's scope of review is limited. Under Section 21(b)(3) of the Act, 33 U.S.C. § 921(b)(3), the Board may set aside decisions of administrative law judges only where their findings of fact are not supported by substantial evidence, are irrational or are not in accordance with law. *O'Keeffe* v. *Smith Associates,* 380 U.S. 359 (1965).

Employer argues that the duties of a security guard do not involve employment within the scope of the Act. We agree, Claimant's duties in the instant case are similar to those of the claimant in *Arbeeney* v. *McRoberts Protective Agency, Inc.,* BRBS , BRB No. 79-371 (June 23, 1980). Accordingly, our decision herein is controlled by our determination in that case that a claimant whose principal duties involve guarding cargo is not an employee within the meaning of Section 2(3) of the Act.

The administrative law judge's reliance upon the Fifth Circuit's opinion in *Jacksonville Shipyards, Inc.* v. *Perdue,*

539 F.2d 533 (5th Cir. 1976), *aff'd sub nom. P.C. Pfeiffer Co., Inc.* v. *Ford,* 444 U.S. 69, 100 S.Ct. 328 (1979), in holding claimant covered is misplaced. That case involved claimants who were engaged in intermediate steps of moving cargo between ship and land transportation. The Supreme Court concluded that their work was an "integral part" of the process of loading or unloading a ship and that they were thus covered by the Act. In the instant case, however, claimant's duties do not involve such an integral part of the loading and unloading process, but rather are typical of the support services incidental to any business operation. *See Holcomb* v. *Robert J. Kirk Associates,* 11 BRBS 835, BRB No. 78-566 (1980); *Arbeeny, supra.*

Therefore, we conclude that claimant is not an employee within the meaning of Section 2(3) of the Act. Accordingly, the Decision of the administrative law judge is reversed.

So Ordered.

Samuel J. Smith
Samuel J. Smith, Chief
Administrative Appeals Judge

I concur:

Ismene M. Kalaris
Ismene M. Kalaris
Administrative Appeals Judge

Miller, Administrative Appeals Judge, dissenting:

For the reasons stated in my dissent in *Arbeeny, supra,* I dissent from the majority's reversal of a finding of coverage for claimant and would affirm the award.

Julius Miller
Julius Miller
Administrative Appeals Judge

Dated this 30th day
of June 1980.

Appendix C

SERVICE SHEET

BRB No. 79-399: MICHAEL J. CONLON v. McROBERTS PROTECTIVE AGENCY INC. and STATE INSURANCE FUND (Case No. 79-LHCA-77) (OWCP No. 2-55820)

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Appendix D, Decision and Order.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
WASHINGTON, D.C. 20036

Case No. 78-LHCA-592
OWCP No. 2-32002

In the Matter of

SAMUEL ARBEENY

Claimant

v.

McROBERTS PROTECTIVE AGENCY, INC.

Employer

and

STATE INSURANCE FUND

Carrier

Irving B. Bushlow, Esquire
26 Court Street
Brooklyn, New York
For the Claimant

Joseph F. Manes, Esquire
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For the Employer and Carrier

Before: ROBERT G. MAHONY
Administrative Law Judge

Appendix D

Decision and Order

This is a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901 *et seq.*), as amended, hereinafter referred to as the Act. The hearing was held on July 20, 1978, at New York, New York, at which time the parties were given an opportunity to adduced testimony, offer documentary evidence and to make oral arguments. The record was left open at the request of Claimant's counsel for various periods of time up to and including December 15, 1978, in order to submit briefs which have been provided and carefully considered.

In evaluating the evidence and reaching a decision in this case I have been guided by the principle that any doubts are to be resolved in favor of the Claimant which is in keeping with the remedial and humanitarian purposes of the Act. *Voris* v. *Eikel* 346 U.S. 328 (1953). Additionally, as the trier of fact I may accept or reject all or any part of the evidence including that of medical witnesses and rely upon my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyard* v. *Donovan* 300 F.2d 741, (1962). Further, it is accepted that disability is an economic concept and depends on such factors as the Claimant's age, industrial history and the availability of work the Claimant can do as well as the Claimant's physical condition. *Mason* v. *Old Dominion Stevedoring Corp.* 1 BRBS 357 (1975).

Statement of the Case

The Claimant was employed as a security guard by the McRoberts Protective Agency. His duties consisted of patrolling the open and covered pier areas as well as a near by "farm" area to maintain cargo security. On infrequent occasions he would be stationed on the ship or gangway to check anyone leaving the ship to insure that

no cargo was stolen and to check papers of the ship's crew.

On January 17, 1974, while working at Pier 7 in Brooklyn, a covered pier, he was injured when a hi-low machine being operated by a longshoreman struck him.

Issue

The sole issue in this case is whether the Claimant is an employee within the meaning of the Act.

Discussion

This Claimant is a security guard whose principal duties are to insure against cargo pilferage. While he may, on occasions go onboard ship to check seaman's papers, or move damaged cargo, on the pier, I do not believe that his principal duties of cargo security are an integral part of longshore operations. He is certainly not a ship repairman, shipbuilder or a shipbreaker.

The legislative history of the 1972 Amendments to the Act, may it clear that not everyone injured on a covered situs could derive benefits under the Act.

The Senate and House Committee Reports stated:

> The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity . . . (S. Report, No. 92-1125, 92 Cong. 2nd Sess. 13 (1972); 1972 U.S. Code Cong. and Admin. News pp. 4707-4708; H.R. Report No. 92-1441, p. 10-11.

In *Northeast Marine Terminal* v. *Caputo*, 432 U.S. 249 (1977), the Supreme Court, in construing the status requirement of the Act stated:

> The example clearly indicates an intent to cover those workers involved in the essential elements of unloading a vessel—taking cargo out of a hold, moving it

> away from the ship's side, and carrying it immediately to a storage or holding area. The example also makes it clear that persons who are on the situs but are not engaged in the over-all process of loading and unloading vessels are not covered. . . . Also excluded are employees who perform purely clerical tasks and are not engaged in the handling of cargo.

The Benefits Review Board and various Courts of Appeal have had occasion to interpret the status requirements as it applies to various waterfront jobs.

The most recent extensive discussion of the status issue by the Benefits Review Board is *Sedmak* v. *Perini North River Associates et al.* 9 BRBS 378 (1978), which established the test for maritime employment to be; "[A] Claimant's employment must have a realistically significant relationship to maritime acitvities involving navigation and commerce over navigable waters in order for that employment to be deemed maritime employment under Section 2(3) . . ." 9 BRBS at 386.

Sedmak also holds, that the Section 20 Presumption, that the claim comes within the provisions of the Act (absent substantial evidence to the contrary), does not apply to a determination of any threshold questions of jurisdiction.

Therefore, since a Claimant's status is a jurisdictional issue, I find and conclude that the Section 20 presumption of coverage does not apply to this case, *Sedmak, supra* 9 BRBS at 383.

Following the established test of viewing a workers over-all duties, as opposed to occasional tasks he might perform, to determine if he was engaged in maritime employment. I find and conclude that this Claimant was not so engaged, and is not covered by the Act. *Caputo, supra* 432 U.S. at 268; *White* v. *Newport News Shipbuilding & Dry Dock Co.* 9 BRBS 493 (1978).

Appendix D

While I have considered the requirement that the Act must be liberally construed, and the necessity for a uniform compensation system for employees who are covered by the Act for at least part of their activity, I am persuaded that the legislative history set out above, as well as the holdings in *Caputo* and *Sedmak* and *White supra* preclude a finding of coverage in this case.

This Claimant's principal duty was to insure that cargo was not stolen. While I recognize that cargo security is an important, function, it is not an integral part of cargo handling. To extend coverage to this class of employee would, I believe, go beyond anything intended even by the liberalized 1972 Amendments.

Claimant may have had incidental duties such as moving aside damaged cargo, or occasionally going aboard ship to check seaman's papers but this was not his principal duty, which was to watch cargo and insure against pilferage. The security service is an incidental support service and is undoubtedly desirable on the waterfront, but it does not have the requisite realistically significant relationship to maritime employment. *Dravo Corp.* v. *Banks* 567 F.2d 593, 7 BRBS 197 (CA 3, 1977). See *White* v. *Newport News Shipbuilding & Dry Dock Co., supra.*

For the foregoing reason, I find and conclude that the Claimant does not meet the jurisdictional status requirement for coverage under the Act.

ORDER

The claim is DENIED.

ROBERT G. MAHONY
ROBERT G. MAHONY
Administrative Law Judge

Dated: April 25, 1979
Washington, D.C.

MAY 25, 1979

RGM:Zee

Appendix E, Decision and Order.

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR

No. 79-399

FILED AS PART
OF THE RECORD
JUN 30 1980
(date)
AGNES KURTZ/WH
(Clerk)
Benefits Review Board

MICHAEL J. CONLON

Claimant-Respondent

v.

McROBERTS PROTECTIVE AGENCY, INC.

and

STATE INSURANCE FUND

Employer/Carrier-
Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

DECISION and ORDER

Appeal from the Decision and Order of V. M. McElroy, Administrative Law Judge, United States Department of Labor.

Appendix E

Angelo C. Gucciardo (Israel, Adler, Ronca, and Gucciardo), New York, New York, for the claimant.

Joseph F. Manes, Croton-on-Hudson, New York, New York, for the employer/carrier.

Laurie M. Streeter, Associate Solicitor (Carin Ann Clauss, Solicitor of Labor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

SMITH, Chief Administrative Appeals Judge:

This is an appeal by McRoberts Protective Agency, Inc. and State Insurance Fund (hereinafter referred to as employer) from a Decision and Order (79-LHCA-77) of Administrative Law Judge V. M. McElroy pursuant to the provisions of the longshoremen's and Harbor Workers' Compensation Act as amended, 33 U.S.C. § 901 *et seq.* (hereinafter referred to as the Act).

Claimant was employed for eighteen years by employer as a security guard, whose principal duties involved insuring the security of cargo on piers and lighters. His job required him to maintain surveillance over cargo on the pier, occasionally boarding the ships in order to watch the cargo as it was unloaded. He also boarded the ships to deliver emergency or other messages to the crew and sometimes to carry the cargo manifest on and off the ship. He also checked the ships' mooring lines in the course of his duties on the pier. Claimant never carried any cargo. He was injured on February 20, 1978, when he slipped and fell on ice while making his rounds. Claimant had a preexisting back injury for which he had surgery in 1974.

Appendix E

Claimant sought benefits under the Act. Following a hearing, the administrative law judge held that claimant's overall duties formed an integral part of the loading and unloading process. Accordingly, the judge concluded that the claimant was an employee under Section 2(3) of the Act. 33 U.S.C. § 902(3). The administrative law judge awarded claimant temporary total disability benefits from February 21 to December 1, 1978, and permanent total disability benefits thereafter with the Special Fund to be liable under Section 8(f), 33 U.S.C. § 908(f), after 104 weeks. He also determined that the employer was liable for an additional assessment of compensation under Section 14(e), 33 U.S.C. § 914(e), and awarded claimant's attorney a fee for services performed.

Employer appeals the administrative law judge's finding that claimant was an employee under the Act. The Board's scope of review is limited. Under Section 21(b)(3) of the Act, 33 U.S.C. § 921(b)(3), the Board may set aside decisions of administrative law judges only where their findings of fact are not supported by substantial evidence, are irrational or are not in accordance with law. *O'Keeffe* v. *Smith Associates*, 380 U.S. 359 (1965).

Employer argues that the duties of a security guard do not involve employment within the scope of the Act. We agree. Claimant's duties in the instant case are similar to those of the claimant in *Arbeeny* v. *McRoberts Protective Agency, Inc.*, —— BRBS ——, BRB No. 79-371 (June 23, 1980). Accordingly, our decision herein is controlled by our determination in that case that a claimant whose principal duties involve guarding cargo is not an employee within the meaning of Section 2(3) of the Act.

The administrative law judge's reliance upon the Fifth Circuit's opinion *in Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F.2d 533 (5th Cir. 1976), *aff'd sub nom. P.C. Pfeiffer Co., Inc.* v. *Ford*, 444 U.S. 69, 100 S.Ct. 328 (1979), in

holding claimant covered is misplaced. That case involved claimants who were engaged in intermediate steps of moving cargo between ship and land transportation. The Supreme Court concluded that their work was an "integral part" of the process of loading or unloading a ship and that they were thus covered by the Act. In the instant case, however, claimant's duties do not involve such an integral part of the loading and unloading process, but rather are typical of the support services incidental to any business operation. *See Holcomb* v. *Robert J. Kirk Associates,* 11 BRBS 835, BRB No. 78-566 (1980); *Arbeeny, supra.*

Therefore, we conclude that claimant is not an employee within the meaning of Section 2(3) of the Act. Accordingly, the Decision of the administrative law judge is reversed.

So Ordered.

Samuel J. Smith, Chief
Administrative Appeals Judge

I Concur:

Ismene M. Kalaris
Administrative Appeals Judge

Miller, Administrative Appeals Judge, dissenting:

For the reasons stated in my dissent in *Arbeeny, supra,* I dissent from the majority's reversal of a finding of coverage for claimant and would affirm the award.

Julius Miller
Administrative Appeals Judge

Dated this 30th day
of June 1980.

Appendix F, Decision and Order.

Docket Number
80 4159
80 4161

NOTICE OF MOTION
state type of motion
for Dismissal Petition
Director, OWCP
80-4158

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Arbeeny, et al v. McRoberts Protective et al.
Arbeeny v. McRoberts Protective Agency et al.

MOTION BY: (*Name and tel. no. of attorney in charge*)
Joseph F. Manes
914 946-6264 WO 2-3955 (212)

Has opposing counsel consented? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☐ Yes ☒ No
(*Substantive motions only*)

Requested return date: October 14, 1980
(*See Second Circuit Rule 27(b)*)

Date of argument of appeal, if scheduled:
Week of November 10, 1980

Judge or agency whose order is being appealed:
Benefits Review Board

Appendix E

OPPOSING COUNSELS (*Name and tel. no. of attorney in charge*)
Catherine Giacona
202 357-0464

Emergency Motions, Motions for stays
& Injunctions Pending Appeal

Has request for relief been made below?

(*See F.R.A.P. Rule 8.*) ☐ Yes No ☐

Would expedited appeal eliminate need for this
☐ Yes ☐ No

If no, explain why not:

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Brief statement of the relief requested: Dismissal of Petition of Drector, OWCP.

Previous requests for similar relief and disposition: None.

Statement of the issue(s) presented by this motion: Does the Director, Office of Workers' Compensation have standing to petition for review or qualify as an aggrieved party under 33 U.S.C. § 921 (c) LHCA?

Brief statement of the facts (*with page references to the moving papers*): Director, OWCP, petitions for review a Benefits Review Board Order, which dismissed a compensation claim under the LHCA for want of jurisdiction and coverage, Respondents Exhibit .

Summary of the argument (*with page references to the moving papers*): Director, OWCP, is not an aggrieved party under 33 U.S.C. § 921 (c). Page 1 et seq. Respondents Memorandum of Law.

Appendix F

Director, OWCP, lacks standing and does not present a case or controversey under Article III of the United States Constitution. Page 8 et seq. Respondents Memorandum of Law.

September 30th 1980
Date

Joseph F. Manes
The name signed must be printed beneath

JOSEPH F. MANES
Attorney for Respondents

ORDER

IT IS HEREBY ORDERED that the motion to dismiss the petition of Director, OWCP in Dkt. No. 80-4161 be and it hereby is granted. This court has alrealy held that the Director is not " 'adversely affected or aggrieved' " by an order of the Benefits Review Board denying claims to compensation, and therefore "lacks statutory standing to petition for review pursuant to 33 U.S.C. §921(c)." *Fusco* v. *Perini North River Assoc.*, 601 F.2d 659, 670 (2d Cir. 1979), vacated and remanded, 444 U.S. 1028 (1980), dismissal of Director adhered to 622 F.2d 1111, 1113 (2d Cir. 1980), rehearing en banc denied Dec. 17, 1980.

Walter R. Mansfield
William H. Mulligan
Circuit Judges
Milton Pollack
District Judge

3-9-81
Date

Office-Supreme Court, U.S.
FILED
AUG 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2180

In the Supreme Court of the United States

OCTOBER TERM, 1980

MCROBERTS PROTECTIVE AGENCY AND STATE INSURANCE FUND, PETITIONERS

v.

SAMUEL ARBEENY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether pier guards, whose principal duty is to maintain the security of cargo during the loading and unloading process, are "engaged in maritime employment" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2180

MCROBERTS PROTECTIVE AGENCY AND STATE INSURANCE FUND, PETITIONERS

v.

SAMUEL ARBEENY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 642 F. 2d 672. The opinions of the Benefits Review Board (Pet. App. 7a-19a) are reported at 12 B.R.B.S. 435 and 12 B.R.B.S. 473. The decisions and orders of the administrative law judges (Pet. App. 20a-24a; A. 73-83) are not reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1981. The petition for a writ of certiorari was filed on June 8, 1981 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "A." refers to the joint appendix in the court of appeals.

STATEMENT

1. Petitioner McRoberts Protective Agency provides a maritime security service for 15 clients in the Port of New York and New Jersey (A. 76). Respondents Samuel Arbeeny and Michael Conlon were employed as pier guards by McRoberts. Their primary responsibility was surveillance of cargo on piers, docks, and other marine terminal areas to protect against theft, fire, and vandalism. Arbeeny and Conlon performed most of their guard work on the pier, but they were required to board ship during loading and unloading operations and at some other times. They regularly worked on the gangways and decks or at the ship's hatch to ensure the security of cargo on the vessel and the security of the vessel and its equipment (Pet. App. 4a, 21a-22a; A. 74). Arbeeny on occasion counted cargo at the ship's hatch with a "checker" who was responsible for checking and recording cargo removed from the hold (Pet. App. 4a). Arbeeny kept a separate count of valuable cargo and also kept a record of damaged cargo (A. 37, 45, 53-54). Conlon often boarded docked vessels to deliver cargo manifests or to obtain manifests for shipments that had already been unloaded. Conlon also checked mooring lines to ensure that vessels were securely moored (Pet. App. 4a). Respondents, like all pier guards employed by McRoberts, required a Coast Guard pass, and were subject to the rules and regulations of the Waterfront Commission of New York and New Jersey (A. 61, 76).

Both Arbeeny and Conlon were injured on piers in the course of their employment (Pet. App. 3a). On January 17, 1974, while working on a covered pier, Arbeeny was injured when he was struck by a hi-lo (fork lift) machine operated by a longshoreman (Pet. App. 22a). Conlon was injured on February 20, 1978, when he slipped on ice and fell while making his rounds (Pet. App. 16a-17a).

2. Respondents Arbeeny and Conlon filed claims for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* Petitioner McRoberts and its insurance carrier, petitioner State Insurance Fund, disputed the claims, asserting that the claimants were not "engaged in maritime employment" within the meaning of Section 2(3) of the Act, 33 U.S.C. 902(3), and therefore were not entitled to compensation under the statute. In separate proceedings, two administrative law judges reached opposite conclusions. One judge determined that Conlon was engaged in maritime employment and awarded him compensation under the Act (A. 73-83). The other judge ruled that Arbeeny was not engaged in maritime employment and, accordingly, rejected his claim (Pet. App. 20a-24a).

In each case the losing party appealed to the Benefits Review Board under 33 U.S.C. 921(b). In divided decisions, the Board ruled that Arbeeny and Conlon were not covered by the Act. In the Arbeeny appeal, the Board recognized that "theft along the waterfront is a major problem of the longshoring industry" but concluded nevertheless that Arbeeny's guard duties were not "an integral part of longshoring operations" (Pet. App. 10a). The Board stated (*id.* at 11a-12a) that security guard employment "lack[s] the realistically significant relationship to maritime activities involving navigation and commerce required by" the Board's earlier decision in *Sedmak* v. *Perini North River Associates*, 9 B.R.B.S. 378, rev'd *sub nom. Fusco* v. *Perini North River Associates*, 601 F. 2d 659 (2d Cir. 1979), vacated and remanded, 444 U.S. 1028 (1980), on remand, 622 F. 2d 1111, cert. denied, Nos. 80-639 & 80-651 (Jan 26, 1981). In the Conlon appeal, the Board simply observed that its decision was "controlled by our determination in [the Arbeeny] case that a claimant whose principal duties involve guarding cargo is not an employee within the meaning of Section 2(3) of the Act" (Pet. App. 17a).

3. Respondents sought judicial review of the Board's decisions under 33 U.S.C. 921(c), and the cases were consolidated on appeal. The court of appeals reversed, holding that Arbeeny and Conlon were engaged in maritime employment within the meaning of the Act (Pet. App. 1a-6a). The court stated that claimants' guard duties were "an integral part of the loading and unloading of cargo" (Pet. App. 6a). The court explained its reasoning as follows (*ibid.*; footnote omitted):

> Pilferage of cargo is endemic at piers. The loading and unloading process presents innumerable opportunities for theft. The major function of [Arbeeny and Conlon] was to protect against the loss of cargo which in our view unquestionably serves a maritime purpose—the safe transit of goods shipped by sea. The pervasive surveillance conducted by guards on the pier and occasionally on board ship is essential to the longshoring operation and is indeed required by the International Longshoremen's Association during the loading and the unloading process.

DISCUSSION

The court of appeals correctly applied this Court's decisions regarding coverage under the Longshoremen's and Harbor Workers' Compensation Act to the particular facts of this case. The court's ruling regarding compensation for security guards on docks and piers does not conflict with the views of any other circuit and does not warrant further review.

1. In *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69 (1979), this Court held that the "maritime employment" coverage test of Section 2(3) of the Act is satisfied by all workers "engaged in intermediate steps of moving cargo between ship and land transportation" (444 U.S. at 83). And in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977), the Court ruled that cargo "checkers," who do not

actually move cargo but identify and record it in its transfer between land and sea transportation, are "engaged in maritime employment" because their work is an "integral part" of the loading and unloading process (*id.* at 271). The court of appeals correctly applied these principles in this case.

The court, after making the undisputed observation that cargo pilferage is a pervasive problem and that "[t]he loading and unloading process presents innumerable opportunities for theft" (Pet. App. 6a), concluded that the claimants' primary duty, guarding against cargo theft, "unquestionably serves a maritime purpose—the safe transit of goods shipped by sea" and is "essential to the longshoring operation" (*ibid.*). For this reason, the court properly determined (*id.* at 5a-6a) that the functions of the pier guards, like the functions of the checker in *Caputo*, are an "integral part" of the longshoring process, because both are critical if maritime cargo is to reach its destination.[2]

2. Petitioners mistakenly assert (Pet. 7, 11-13) that the decision of the court of appeals rests on the fact that the claimants' work regularly took them aboard ships. Having

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[2]Contrary to petitioners' assertion (Pet. 12), this case is distinguishable from *Maher Terminals, Inc.* v. *Farrell*, 548 F. 2d 476 (3d Cir. 1977), in which the Third Circuit held that a marine terminal office employee was not covered by the Act. The security functions of the pier guards here are far more closely related to the longshoring process than were the functions of a purely clerical employee who did not work on a pier, dock, or vessel and who was not directly involved in the movement of cargo. The court of appeals' holding that the pier guards' work is integrally related to the longshoring process is consistent with the decisions of other courts that, for example, workers who maintain and repair the machinery, equipment, and facilities used in longshoring operations are covered by the Act. *E.g.*, *Hullinghorst Industries, Inc.* v. *Carroll*, 650 F. 2d 750 (5th Cir. 1981); *Garvey Grain Co.* v. *Director, OWCP*, 639 F. 2d 366 (7th Cir. 1981); *Prolerized New England Co.* v. *Benefits Review Board*, 637 F. 2d 30, 37-38 (1st Cir. 1980), cert. denied, No. 80-1609 (June 15, 1981); *Price* v. *Norfolk & Western Ry.*, 618 F. 2d 1059, 1061-1062 (4th Cir. 1980); *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F. 2d 137, 140-141 (9th Cir. 1978).

characterized the decision in this way, petitioners contend that it is inconsistent with this Court's emphasis on the nature of a claimant's occupation in *P.C. Pfeiffer Co.* v. *Ford, supra.* But petitioners' premise is incorrect. The court of appeals based its decision primarily on its determination that the guards' security functions are an integral element of the longshoring process, and only incidentally noticed the location of the guards' work.

Moreover, the fact that respondents' work regularly took them on and off ships furnishes an entirely proper alternative ground for the court of appeals' ruling, and this Court's decision in *P.C. Pfeiffer Co.* v. *Ford, supra,* does not stand for a contrary proposition. In *Ford,* the Court considered only whether certain kinds of work, even if performed entirely on land, were covered by the Act. In that context, the Court rejected the proposition that only work performed in part aboard vessels can be deemed "maritime employment." The court did not need to, and did not, consider whether some kinds of work, regularly performed in part aboard a vessel, may nevertheless fall outside the scope of "maritime employment," as that term is used in Section 2(3) of the Act. The Court did, however, observe in passing that a central objective of the 1972 amendments to the Act was "to ensure that a worker who could have been covered part of the time by the pre-1972 Act would be completely covered by the 1972 Act" (444 U.S. at 75). Arbeeny and Conlon fall within this description, because the shipboard parts of their work were unquestionably covered by the pre-1972 Act on the basis of their location. *E.g., Calbeck* v. *Travelers Insurance Co.,* 370 U.S. 114 (1962).

3. The court of appeals' decision is supported by early cases holding that port guards were within the coverage of the original Longshoremen's Act. Before this Court's rulings in *Calbeck* and in *Davis* v. *Department of Labor,* 317

U.S. 249 (1942), the "maritime but local" doctrine limited coverage of the Longshoremen's Act to employment injuries that were beyond the constitutionally permissible reach of state workers' compensation laws. The Act covered injuries in which the employment was directly related to interstate or international maritime commerce, but not injuries where the employment, though performed on federal navigable waters, was "of local concern and of no direct relation to navigation and commerce." *Calbeck* v. *Travelers Insurance Co., supra,* 370 U.S. at 122. See *Sun Ship, Inc.* v. *Pennsylvania,* 447 U.S. 715, 717-719 (1980). Yet, even under that understanding of the coverage of the Act, the duties of port guards, to the extent performed aboard ship, were repeatedly held by the courts of appeals to be beyond the competence of state laws and hence within the Act's coverage. *Union Oil Co.* v. *Pillsbury,* 63 F. 2d 925 (9th Cir. 1933); *Seneca Washed Gravel Corp.* v. *McManigal,* 65 F. 2d 779 (2d Cir. 1933); *Lowe* v. *Central R.R.,* 113 F. 2d 413, 415 (3d Cir. 1940); *Hillcone S.S. Co.* v. *Steffen,* 136 F. 2d 965 (9th Cir. 1943). The "maritime but local" test is, of course, no longer the measure of the Act's coverage. See *Sun Ship, Inc.* v. *Pennsylvania, supra,* 447 U.S. at 720. Even under that narrow test, however, the early cases established the maritime character of port guards' work and thus support the court of appeals' decision here.

4. The decision of the court of appeals does not conflict with the ruling of any other court. Other cases involving the Act's coverage of port guards are pending before the Fifth Circuit (*Holcomb* v. *Robert W. Kirk Associates,* No. 80-5246 (argued Apr. 21, 1981)) and the Ninth Circuit (*Kelly* v. *Marine Terminals Corp.,* petition for review, No. 81-7999 (filed July 30, 1981)), and still others are pending before or have been decided by the Benefits Review Board and will be reviewed by other circuits. Intervention by the

Court at this time would therefore be premature, even assuming that the issue is one that would merit review should a conflict arise.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1981

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